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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER, Plaintiff, vs. HARRAH'S ENTERTAINMENT, INC. and DOES 1 through 100, inclusive, Defendants.	CASE NO. 07 CV 2226 H (RBB) Judge: Hon. Marilyn L. Huff Mag. Judge: Hon. Ruben B. Brooks MEMORANDUM OF POINTS AND AUTHORITIES BY *SPECIALLY APPEARING* DEFENDANT IN SUPPORT OF MOTION TO DISMISS PURSUANT TO F.R.CIV.P. RULE 12(b)(2), (6) ACCOMPANYING DOCUMENTS: NOTICE OF MOTION AND MOTION; DECLARATION OF MARIA C. ROBERTS; DECLARATION OF MICHAEL KOSTRINSKY; NOTICE OF LODGMENT OF EXHIBITS; AND [PROPOSED] ORDER Date: January 7, 2008 Time: 10:30 a.m. Courtroom: 13

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I.

INTRODUCTION

JAMES M. KINDER, a former attorney and notorious "vexatious litigant," filed this action seeking statutory damages for, among other things, alleged violations of the Telephone Consumer Protection Act of 1991. (Exh. 1.) However, as a Court-ordered "vexatious litigant," KINDER is subject to a "prefiling order" by the San Diego County Superior Court, which requires that he obtain leave of Court before he files any new lawsuit. (Exh. 2.) KINDER did not do so in this case, despite his obvious knowledge of this requirement. KINDER has filed declarations "by Vexatious Litigant" in other lawsuits in support of a pre-filing order. (Exh. 3.) However, as the Superior Court docket in this action reflects, KINDER filed no such declaration and failed to obtain the requisite leave of Court from the Presiding Judge of the San Diego County Superior Court prior to the filing of the instant action on October 2, 2007. (Exh. 4.) Inasmuch as KINDER filed his lawsuit without satisfying the prefiling order requirements to which he is subject, his Complaint is fatally flawed and fails to state a claim upon which relief could be granted.

In addition, the entity KINDER sued in this case, *Specially Appearing* Defendant Harrah's Entertainment, Inc., lacks sufficient minimum contacts with the State of California to be subject to jurisdiction in this case. It is a foreign corporation that does not have offices in California; does not own property in California; does not have employees in California; and, does not conduct business in California. (Kostrinsky Decl., ¶2.) Thus, this Court lacks personal jurisdiction over *Specially Appearing* Defendant. Moreover, KINDER has sued the wrong entity in that *Specially Appearing* Defendant does not have employees and does it make telephone calls to California residents as alleged in the Complaint. (Kostrinsky Decl., ¶3.) On these additional bases, KINDER's Complaint must be dismissed.

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II.

PERTINENT FACTS

KINDER filed his Complaint against *Specially Appearing* Defendant Harrah's Entertainment, Inc. on October 2, 2007. (Exh. 1.) KINDER's Complaint sets forth claims for alleged violations of the Telephone Consumer Protection Act (*Id.* at ¶¶5-9), California Civil Code §1770 (*Id.* at ¶¶10-15), Unfair Business Practices Act (*Id.* at ¶¶21-23), and an alleged trespass to chattel. (*Id.* at ¶¶16-20.)

In 2003, JAMES KINDER was determined by the San Diego County Superior Court (in San Diego Superior Court Case No. SC137653), to be a vexatious litigant. This was no surprise given the vast amount of highly questionable litigation KINDER has initiated in this county over the past 20 years. KINDER is now subject to a "prefiling order" by the San Diego County Superior Court, which mandates that he obtain leave of Court before filing any new lawsuit. (Exh. 2.) The determination that KINDER is a vexatious litigant has not stopped him from filing other meritless lawsuits. KINDER has, in at least one other recently filed case, submitted a "Declaration of James M. Kinder in Support of Filing by Vexatious Litigant." That case involved very similar allegations as those alleged herein. (Exh. 3.) The Superior Court docket for the instant matter reflects that KINDER has not filed a declaration by vexatious litigant in support of the filing of this lawsuit and did not obtain leave of Court prior to filing this case on October 2, 2007. (Exh. 4.) On November 21, 2007, *Specially Appearing* Defendant effected a timely and proper removal of this action to the United States District Court for the Southern District of California. (Roberts Decl., ¶ 3.)

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Specially Appearing Defendant Harrah's Entertainment, Inc. is a Delaware corporation headquartered in Las Vegas, Nevada. It does not have offices in California; does not own property in California; does not have employees in California; and, does not conduct business in California. (Kostrinsky Decl., ¶2.) In addition, *Specially Appearing* Defendant Harrah's Entertainment, Inc. does not make telemarketing or other telephone calls to individuals in California using an automatic telephone dialing system, artificial or prerecorded voice, or otherwise. It also does not have employees who do this. (Kostrinsky Decl., ¶3.)

III.

AUTHORITY ON MOTION TO DISMISS

Rule 12 of the Federal Rules of Civil Procedure provides, in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: […] (2) lack of jurisdiction over the person, (3) improper venue, […] (6) failure to state a claim upon which relief can be granted […]

(F.R.Civ.P. 12(b).) In a motion to dismiss for lack of personal jurisdiction, although a defendant is the moving party, the plaintiff is the party who invoked the court's jurisdiction and therefore the plaintiff bears the burden of proof on the necessary jurisdictional facts; *e.g.*, the existence of "minimum contacts" between defendant and the forum state. (*Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002).) And, a Rule 12(b)(6) motion is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." (*Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).)

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IV.

ARGUMENT

A. **KINDER's Complaint Must Be Dismissed As KINDER, A Well-Known And Court-Ordered Vexatious Litigant, Failed To Obtain The Requisite Pre-Filing Order.**

California Code of Civil Procedure §391.7 provides, in pertinent part:

> In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter **a prefiling order** which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

(Code of Civil Procedure §391.7(a) (emphasis added).) The "vexatious litigant statute" was enacted by California's Legislature to ease the unreasonable burden placed upon the courts by groundless litigation. (*Wolfe v. Strankman*, 392 F.3d 358, 360-361 (9th Cir. 2004); *see also, In re Natural Gas Anti-Trust Cases I*, 137 Cal.App.4th 387, 393-394 (2006) (prefiling order component of vexatious litigant statute is necessary method of curbing those for whom litigation has become a game; it does not deny the vexatious litigant access to the courts).)

It is well established that failure to follow the requirements of any prefiling order by a vexatious litigant are grounds for dismissal of the action. (*Forrest v. Department of Corrections*, 150 Cal.App.4th 183, 195 (2007) (vexatious litigant statute authorizes trial court to issue prefiling order prohibiting the filing of "new litigation" without court permission and allows for dismissal of pending action for violation of that order, even if new litigation appears to be meritorious).) In the recent *Forrest* case, the California Court of Appeal dismissed a wrongful termination action filed by an employee who had been designated a vexatious litigant, and who violated a prefiling order prohibiting the filing of new litigation without court permission. The Court of Appeal noted:

> To the extent [section 391.7] keeps vexatious litigants from clogging courts, it is closer to 'licensing or permit systems which are administered pursuant to narrowly drawn, reasonable and definite standards' which represent 'government's only practical means of managing competing uses of public facilities. [Citation.]" (*Wolfgram v. Wells Fargo Bank*, 53 Cal.App.4th 43, 60 (1997). Granted, "[w]hen a vexatious litigant knocks on the courthouse door with a colorable claim, he may enter." (*PBA, LLC v. KPOD, Ltd.*, 112 Cal.App.4th 965, 975 (2003). But that entry may be conditioned on representation by counsel or permission from the presiding judge to proceed pro se along with the posting of

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> security. (§ 391.7, subds.(a) & (b).) When those conditions are not met, dismissal may be an appropriate remedy even if the lawsuit is meritorious. (§ 391.7, subds.(a) & (c).)

(*Forrest*, 150 Cal.App.4th at 198 (internal quotations and citations omitted).)

Indeed, the scope of California's vexatious litigant statute is broad, and extends beyond mere cases filed *in propria persona* by a vexatious litigant, especially where that vexatious litigant is an attorney (or, as here, a former attorney). (*In re Shieh*, 17 Cal.App.4th 1154, 1166-1167 (1993) (after it was determined that attorney was vexatious litigant, prefiling order prohibiting him from filing any new litigation without first obtaining leave of presiding judge of court in which he proposed to file would not be limited to attorney's *in propria persona* activities, but rather would include litigation filed through counsel, in view of attorney's history of drafting documents filed on his behalf by other attorneys and using those attorneys as mere puppets); *see also, Bravo v. Ismaj*, 99 Cal.App.4th 211, 219 (2002) (Court of Appeal presumes the order declaring a litigant vexatious is correct and implies finding necessary to support the judgment); *Camerado Ins. Agency, Inc. v. Superior Court*, 12 Cal.App.4th 838, 840 (1993) (vexatious litigant could be required to post security under section 391.3 in a pending action even though represented by counsel).)

The Administrative Office of the Courts in California maintains a "Vexatious Litigant" list of all persons who are prohibited from filing new lawsuits without first obtaining leave of Court (from prefiling orders the Administrative Office of the Courts receives from California Superior Courts). JAMES M. KINDER appears on that list as a vexatious litigant.[1] (Exh. 2.)

Notwithstanding, KINDER did not do what was required of him before filing this action. That is, despite the fact that he is well-versed in the requirements imposed upon him by virtue of his being declared a vexatious litigant. In an almost identical lawsuit alleging violations of the Telephone Consumer Protections Act, *James M. Kinder v. Sprint PCS Assets, LLC, et al.*, United States District Court, Southern District of California, Case No. 07CV2049 WQH JMA, KINDER submitted a "Declaration of James M. Kinder in Support of Filing by Vexatious Litigant." (Exh. 3.) In that sworn declaration, KINDER admits that he is a vexatious litigant, and sets forth what he believes are facts to justify obtaining a pre-filing order in that case from the Presiding Judge of the San Diego County Superior Court. (*Id.*) He filed no such declaration in this action.

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[1] James M. Kinder, San Diego County Superior Court, Case No. SC137653, 5/21/03.

As a former attorney who was licensed in California before being disbarred, KINDER knows full well that prior to filing any new complaint in the San Diego County Superior Court (or, for that matter, any court in the State of California), he is subject to a prefiling order requiring leave of court to file a new lawsuit. The requirements imposed upon vexatious litigants – such as KINDER – are very straightforward. (CCP section 391.7.) KINDER failed to follow those requirements. Inasmuch as KINDER, a declared vexatious litigant, failed to obtain the requisite prefiling order before filing the instant action in the San Diego County Superior Court, the underlying action is improper and must be dismissed. (*See, Forrest*, 150 Cal.App.4th at 195; *In re Shieh*, 17 Cal.App.4th 1154, 1166-1167 (1993).)

B. **This Court Lacks Jurisdiction Over *Specially Appearing* Defendant.**

1. **Authority on Jurisdiction.**

Federal Rule of Civil Procedure 12(b)(2) permits a defendant to raise certain defenses by motion to dismiss, including, lack of personal jurisdiction. The starting point for determining whether personal jurisdiction exists for a defendant sued in federal district court is the long arm statute in effect in the state in which the district court is located. (*Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974).)

Under California law, the standard for state courts to exercise jurisdiction is "on any basis not inconsistent with the Constitution of [California] or of the United States." (California Code of

Civil Procedure §410.10.) "A State court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate 'traditional notions of fair play and substantial justice.'" (*Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 444-445 (1996), quoting, *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).)

Personal jurisdiction may be asserted by courts in California in one of two ways – general or specific. (*Vons Companies, Inc.*, 14 Cal.4th at 445.) A nonresident defendant may be subject to general jurisdiction only if his or her contacts in the forum state are "substantial . . . continuous and systematic." (*Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-446 (1952); *see also*, *Helicoptores Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-415 (1984).) Where a nonresident defendant does not have the requisite substantial and systematic contacts with the forum sufficient to establish general jurisdiction, it may be subject to the specific jurisdiction of that forum. However, specific jurisdiction cannot be found unless it is shown by competent evidence that the defendant has purposefully availed itself of forum benefits and the "controversy is related to or arises out of a defendant's contacts with the forum." (*See*, *Burger King v. Rudzewicz*, 471 U.S. at 472-473 (1985); *Helicoptores*, 466 U.S. at 414.)

In order for a forum to assert specific (or "limited") jurisdiction over an out-of-state defendant who has not consented to suit there, three requirements must be met:

1) the nonresident must engage in an act, consummate a transaction, or perform an act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws (also referred to as "purposeful availment");
2) the lawsuit must arise out of the nonresident's forum-related activities; and,
3) the exercise of jurisdiction must be fair and reasonable.

(*See, Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *Helicoptores,* 466 U.S. at 414;

Doe v. American National Red Cross, 112 F.3d 1048, 1051(9th Cir. 1997); *Core-Vent Corp. v. Nobel Industries, AB*, 11 F.3d 1482, 1485 (9th Cir. 1993); *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1247 (9th Cir. 1984).)

In determining whether such "minimum contacts" exist for a valid assertion of jurisdiction over a nonconsenting nonresident, who is not present in the forum, a court must look at " 'the quality and nature of [the nonresident's] activity in relation to the forum [to determine whether it] renders such jurisdiction consistent with traditional notions of fair play and substantial justice." (*Burnham v. Superior Court of California (County of Marin)*, 495 U.S. 604, 618 (1990); *International Shoe*, 326 U.S. at 316, 319.) A court will also examine the nature and quality of the defendant's contacts in relation to the cause of action. (*Data Disc, Inc. v. Systems Technology Assocs.*, 557 F.2d 1280, 1287 (9th Cir. 1977).)

The ultimate determination rests on some conduct by which the nonresident has purposefully availed himself of the privilege of conducting activities within the forum state to invoke its benefits and protections, and a sufficient relationship or nexus between the nonresident and the forum state such that it is reasonable and fair to require the nonresident to appear locally to conduct a defense. (*Kulko v. Superior Court of California*, 436 U.S. 84, 93-94, 96-97, 98 (1978); *Khan v. Superior Court*, 204 Cal.App.3d 1168, 1175-1176 (1988).) This latter "fairness" finding requires a balancing of the burden or inconvenience to the nonresident against the resident plaintiff's interest in obtaining effective relief, and the state's interest in adjudicating the particular dispute, which ultimately turns on the nature and quality of the nonresident's forum-related activity. (*Kulko*, 436 U.S. at 94; *see also*, *Khan*, 204 Cal.App.3d at 1179-1180.)

As with any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not to be applied mechanically; rather, a court must weigh the facts of each case. (*Kulko*, 436 U.S. at 92, 98.) Furthermore, as explained by the United States Supreme Court, each individual has a liberty interest in not being subject to the judgments of a forum with which he or she has established no meaningful minimum "contacts, ties or relations." (*Burger King Corp.*, 471 U.S. at 471-472, quoting, *International Shoe*, 326 U.S. at 319.) As a matter of fairness, a defendant should not be "hailed into a jurisdiction solely as the result of 'random,' 'fortuitous,' or 'attenuated' contacts." (*Burger King Corp.*, 471 U.S. at 475.)

Finally, when jurisdiction is challenged by a nonresident defendant, the burden is on the plaintiff to demonstrate sufficient "minimum contacts" exist between the defendant and forum state to justify the imposition of jurisdiction. (*Sibley v. Superior Court*, 16 Cal.3d 442, 445 (1976).) Only where plaintiff is able to meet this burden does the burden shift to the defendant to demonstrate that the exercise of jurisdiction would be unreasonable. (*Vons Companies, Inc.*, 14 Cal.4th at 449.)

2. *Specially Appearing* Defendant Harrah's Entertainment, Inc. Utterly Lacks Sufficient Contacts With California To Be Brought Before The Court Under Either A Theory Of General Or Specific Jurisdiction.

(a) *Specially Appearing* Defendant Harrah's Entertainment, Inc. Is a Foreign Corporation That Lacks Continuous and Systematic Contacts With California.

As noted above, a Court may exercise general jurisdiction over a defendant for substantial, continuous, and systematic contacts with the forum state. (*Helicoptores,* 466 U.S. at 414-415.) Here, *Specially Appearing* Defendant Harrah's Entertainment, Inc. utterly lacks sufficient contacts with California for this Court's assertion of general jurisdiction over them. *Specially Appearing* Defendant Harrah's Entertainment, Inc. is a Delaware corporation, headquartered in Las Vegas, Nevada. (*See*, Kostrinsky Decl., ¶2.) It does not have offices in California; does not own property in California; does not have employees in California; and does not conduct business in California. (*Id.*) *Specially Appearing* Defendant Harrah's Entertainment, Inc. has absolutely no case-related contacts in this matter. (*See*, *id.*) Accordingly, *Specially Appearing* Defendant Harrah's Entertainment, Inc. has no systematic and continuous contacts with California which would justify this Court's exercise of general jurisdiction over it. (*See*, *Helicoptores,* 466 U.S. at 414-415.)

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(b) This Court May Not Exert Specific Jurisdiction Over *Specially Appearing* Defendant Harrah's Entertainment, Inc.

As noted above, *Specially Appearing* Defendant Harrah's Entertainment, Inc. is a foreign corporation headquartered in Las Vegas, Nevada. (*See*, Kostrinsky Decl., ¶2.) It does not have offices in California; does not own property in California; does not have employees in California; and does not conduct business in California. (*Id.*) *Specially Appearing* Defendant Harrah's Entertainment, Inc. has absolutely no case-related contacts in this matter. (*See*, *id.*) Moreover, *Specially Appearing* Defendant Harrah's Entertainment, Inc. does not make telemarketing or other telephone calls to individuals in California using an automatic telephone dialing system, artificial or prerecorded voice, or otherwise. It also does not have employees who do this. (Kostrinsky Decl., para. 3.) Therefore, *Specially Appearing* Defendant Harrah's Entertainment, Inc. has no **case-related contacts** that show it purposefully availed itself of the benefits and protections associated with doing business in California. (*See*, Kostrinsky Decl., ¶¶2, 3.)

As a result, this Court cannot exercise specific jurisdiction over *Specially Appearing* Defendant Harrah's Entertainment, Inc. Any exercise of such jurisdiction would offend notions of fair play and substantial justice for several reasons. (*Burger King*, 471 U.S. at 477.) This court should consider the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies. (*Id.*)

Subjecting *Specially Appearing* Defendant Harrah's Entertainment, Inc. to jurisdiction in California when they do not conduct business in the forum, do not have offices in California; do not own property in California; and do not have employees in California would place an enormous burden on defendant. Such a ruling would allow any plaintiff, in any location, to sue defendant even when that defendant does not conduct any business in the forum. Furthermore, this result would fundamentally alter the personal jurisdiction analysis by allowing the location of plaintiff to control where a defendant could be sued. Personal jurisdiction must focus on a **defendant's** contacts with a given forum, not where a plaintiff is simply located. (*Calder v. Jones*, 465 U.S. 783 (1984); *Helicopteros*, 466 U.S. at 46-417.) Where, as here, a defendant does not conduct business in the forum, and its employees do not engage in the acts alleged in the Complaint, whether in California or otherwise, a plaintiff's location in the forum cannot reasonably form the basis for personal jurisdiction over that defendant. California has little, if any, interest in adjudicating this dispute given these facts. Thus, KINDER'S case must be dismissed for lack of personal jurisdiction.

C. KINDER's Complaint Fails To State A Claim As He Has Named The Wrong Entity.

Specially Appearing Defendant Harrah's Entertainment, Inc., owes Plaintiff no duty of care. As noted above, *Specially Appearing* Defendant Harrah's Entertainment, Inc. is a Delaware corporation headquartered in Las Vegas, Nevada. It does not have offices in California; does not own property in California; does not have employees in California; and, does not conduct business in California. (Kostrinsky Decl., ¶2.) In addition, *Specially Appearing* Defendant Harrah's Entertainment, Inc. does not make telemarketing or other telephone calls to individuals in California using an automatic telephone dialing system, artificial or prerecorded voice, or otherwise. (*Id.* at ¶3.) In his eagerness to file yet another lawsuit, KINDER has named the wrong entity. Thus, Plaintiff's claims fail as a matter of law, and his Complaint must be dismissed.

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V.

CONCLUSION

Based on the foregoing, *Specially Appearing* Defendant's motion to dismiss should be granted inasmuch as KINDER failed to obtain the requisite prefiling order before filing this action. Moreover, this Court lacks personal jurisdiction over *Specially Appearing* Defendant, which is not even the correct entity based on KINDER's allegations.

SHEA STOKES, ALC

Dated: November 30, 2007

By: /s/Ronald R. Giusso
Maria C. Roberts
Ronald R. Giusso
Attorneys for *Specially Appearing* Defendant
HARRAH'S ENTERTAINMENT, INC.

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